NEGLIGENCE ARISING FROM CONTRACTORS WORKING IN CONFINED SPACES

TERM PAPER

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TOPICAL OUTLINE

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I. INTRODUCTION

An area that has received much attention in the last decade from the industrial safety standpoint, is the protection of workers who perform tasks in a "confined space". A confined space is defined as a work area that has the potential to seriously injure anyone who enters the area because of an unsafe atmosphere. An example of a confined space would be a large tank that workers must occasionally enter to perform maintenance work. The tank might contain an invisible, odorless gas which could seriously injure any worker who enters the tank.

Over the years, many workers have been injured or killed from working in a confined space because the worker could not tell by his own senses that the atmosphere was dangerous. This dangerous situation was brought to the attention of the U.S. Government and in 1981 the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) issued new regulations which were designed to reduce the risks to employees from confined spaces.[1]

These OSHA regulations required employers to protect their employees from potential dangers in confined spaces by establishing a comprehensive safety program. OSHA required these safety programs to have the following elements:[2]

1. Testing equipment to determine the safety of the atmosphere in the confined space.
2. Labelling of confined spaces.
3. Trained personnel to perform the testing work.
4. Training program to alert workers of dangers of confined spaces.
5. Proper rescue equipment in the event something goes wrong while an employee is working in a confined space.
6. Self-contained breathing apparatus must be available for employees to use if the atmosphere is contaminated in the confined space.

Most companies who follow OSHA regulations buy the necessary equipment required and designate an employee to become responsible for administering this safety program. These OSHA rules regarding confined spaces have been fairly well accepted by large companies who have the resources to buy the equipment required and have a knowledgeable, responsible employee who can manage the safety program.

Although the duties the employer has towards his own employees is fairly well established by these OSHA regulations, it is not clear what specific responsibility the employer has towards contractors who perform work for the employer on the employer's property. Many large companies use contractors to perform work for any number of reasons including availability of employees, special talents required, lower cost, or speed of accomplishing the work. Failure by the employer to maintain the proper relationship with a contractor could lead to lawsuits involving negligence.

Negligence, as a word in the English language, is defined as:[3]

1. Habitually failing to do the required thing; neglectful
2. Careless, inattentive, etc.

Negligence in legal terms, can be broadly defined as:[4]

> The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

To avoid negligence, there is a legal obligation to act under the following guidelines:[5]

> It is the duty of every person, when reasonably within his power, to protect life and limb against peril, to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services, or use his property in such a manner as to avoid such injury.

Keeping these general definitions and guidelines of negligence in mind, a review will be made of three hypothetical situations which could arise when an employer uses a contractor to perform work in a confined space. Each hypothetical situation will be reviewed with respect to negligence based upon the result of past court cases.

HYPOTHETICAL SITUATION ONE

> An owner of a property hires a contractor to perform various work on the owner's property including work that must be done in a confined space. Does the owner have a responsibility to inform the subcontractor of the special potential dangers in the confined space?

"A person who enters the premises or a particular portion thereof to perform work for the owner or occupant occupies the status of an invitee or business visitor while upon the premises of the owner and is not a trespasser, and the owner or occupant has the duty to use ordinary or reasonable care to keep the premises safe for him, or to warn him of dangers, known to the owner or occupant, not likely to be known to him."[6]

This preceding paragraph says that the owner does have a duty to inform the contractor about the potential dangers of the confined space. This is supported by the following cases:

HENDRICKS V. SOCONY MOBIL OIL CO.[7]

In this case, a gas station had a steel pole light which provided exterior lighting for the gas station. The lights on the pole quit functioning and the owners of the gas station contracted an electrician to repair the lights. The electrician arrived at the gas station and the owner told him which light pole to repair. The electrician placed his 20 foot extension ladder against the 20 foot high steel pole. On the second trip up the ladder, the pole broke at the base causing the pole, ladder, and electrician to fall to the ground. The electrician was seriously injured and sued the owners of the gas station. During the trial, evidence was presented that the owners knew before the accident that the pole was very rusty at the base of the pole. The court ruled that this rusty condition could not have been apparent to the electrician. The court ruled that the gas station owners were liable because they had a duty to inform the electrician of the latent defect in the pole.

PAUL V. STATEN ISLAND EDISON CORP.[8]

In this case, a 45 foot long wooden utility pole became rotten and had to be replaced with a new pole. The pole supported both an electrical power line and telephone lines. The telephone company removed its terminal box from the pole. The terminal box was mounted with (3) bolts which went clear through the pole approximately 20 feet above the ground. The telephone company

then erected a new pole right next to the old pole, lashed the new pole to the old pole, and then cut off the old pole at ground level. At 20 feet above the ground where the terminal box bolt holes were, rope was lashed around both poles so that the bolt holes were not visible. The utility company then contracted a company to move the electrical power lines from the old pole to the new pole and then to remove the old pole. The work order issued to the contractor said to replace a "defective pole". Six months after the old pole had been lashed to the new pole, the contractor arrived to move the electrical power lines. An electrician inspected the base of the old pole for defects as per common practice. The electrician then climbed the pole. The old pole broke at a point 20 feet above the ground. The electrician was thrown into high voltage lines and was electrocuted. The electrician's estate sued both utility companies. The court found that the pole had a hidden or latent defect 20 feet above ground level because the rope lashing covered the spot where the pole was weakened and rotted from the 3 bolts which held the telephone company terminal box. The electrician could not have been expected to see or know about this defect since it was covered with rope. The court ruled that the utility companies should have informed the contractor of the specific nature of the latent defect. The work order which said "defective pole" was considered to be insufficient warning of the latent defect.

As both of these cases illustrate, an owner has a legal obligation to inform contractors of potentially dangerous situations like confined spaces. The owner has an obligation to inform a

contractor of any hazardous condition the owner is aware of and that the contractor is not aware of. The owner should also be very specific in describing the location and exact nature of the dangerous condition.

III. HYPOTHETICAL SITUATION TWO

> An owner of a property hires a contractor to perform work in a potentially dangerous area like a confined space. The owner makes the contractor aware of the specific hazards involved. The owner also informs the contractor that the contractor is responsible for providing for the safety of the contractor's employees. While the work is being performed, an accident takes place and a contractor's employee is injured. Is the owner liable for any injuries suffered by the contractor's employee?

This issue is addressed in the following previous court cases:

PAUL V. STATEN ISLAND EDISON COMPANY[9]

As part of the court rulings in this case, it was noted by the court that the owner is relieved of responsibility either to furnish a safe place to work or to give warning of danger where the structure is defective and the workman is employed for the specific purpose of correcting or repairing the defect or where the prosecution of the work itself makes the place unsafe and creates the danger. As noted above, in this case the owner was found liable because the owner did not properly notify the contractor of the latent defect in the wooden utility pole.

BELL V. LIBERTY DRUG CO.

From 1947 until 1957, a drugstore had a neon sign hanging in front of the store. In 1957, it entered into a written contract with a neon light company in which the old neon light was to be replaced with a new one by the neon light company. The contract called for the neon light company to inspect and paint the old chain that supported the old neon light. This chain was then to be used to hang the new light. The President of the neon light company and one of his salesmen arrived one day at the drugstore to inspect the supporting bars and chains on the old neon light. The President placed a ladder against the old neon light, and when he started to climb the ladder, the chain broke causing the ladder and President to fall to the ground. The President was injured and sued the drugstore. The court ruled that a worker who is injured through the dangerous condition he has undertaken to fix can not ordinarily recover any damages from the owner as the worker is deemed to have assumed all the necessary risks involved with the job.

It is apparent from these two cases that if the owner informs the contractor of the potentially dangerous situation, the contractor then assumes all risks associated with performing the work and therefore the owner is not liable for any damages incurred by the contractor's employees while they are performing the work.

IV. HYPOTHETICAL SITUATION THREE

An owner hires a contractor to perform work which includes the potentially dangerous condition of working in a confined space. The owner informs the contractor of the specific location and potential hazards of the confined space. The contractor reviews the tasks to be performed. The contractor determines that he lacks the special safety equipment required to perform the task safely. The contractor asks the owner to loan the contractor the special safety equipment which the owner possesses. The owner agrees and loans his safety equipment to the contractor. While using the owner's safety equipment, the contractor has an accident. Is the owner liable for damages resulting from injury to one of the contractor's employees?

This issue is addressed in the following court cases:

DIXON V. UNITED STATES OF AMERICA[11]

In 1956, an employee of the U.S. Government made an oral agreement with his son-in-law for a 47 foot deep well to be cleaned. The son-in-law was not an employee of the U.S. Government and was an independent contractor who agreed to charge $8.00 to clean the well. Just prior to entering the well, a discussion was held between the son-in-law and several U.S. Government employees regarding the fact that people are occasionally killed when they enter wells because they are overcome by noxious "damp" gas. The U.S. Government loaned the independent contractor a tripod, pulley, and rope. The son-in-law attached himself to the rope and a U.S. Government employee lowered the rope until the son-in-law was standing on the bottom of the well. The son-in-law disconnected the rope from his body and began to fill several buckets full of dirt. The son-in-law tied the rope to the buckets and the U.S.

Government employee pulled the buckets to ground level. The son-in-law then requested to be pulled out of the well. The son-in-law collapsed before he could tie the rope back to his body. Help was summoned, and 15 minutes later he was removed from the well. A doctor pronounce him dead from gas poisoning. The son-in-law's estate sued the U.S. Government. The court determined that the U.S. Government had an obligation to warn the son-in-law of the potential danger of being asphyxiated in the well. The court determined the U.S. Government has met this obligation because of the conversation between the son-in-law and the Government employees regarding the potential dangers involved with entering wells. The court also determined a professional well cleaner should be aware of the potential dangers of entering any well. The court also ruled that it was proper for the U.S. Government to loan the tripod, pulley, and rope to the son-in-law. The court ruled that since none of this loaned equipment was defective, it was proper to loan this equipment.

PETTY V. CRANSTON PRINT WORKS COMPANY[12]

In 1952, a printing plant had 23 of its 30 building heaters freeze and break. The printing plant hired a contractor to repair the broken heating units. When the contractor arrived at the plant, he only brought A-type folding ladders with him. The contractor noticed that the printing plant owned a scaffolding which was on removable caster wheels. The contractor needed a scaffolding to perform his repair work. The printing company agreed to loan the scaffolding to the contractor. The printing

plant owned this scaffolding and had purchased the scaffold for its own employees to use. Up until the time the contractor borrowed the scaffolding, the owner had experienced no problems with the scaffold. After the contractor had used the scaffolding for several weeks, he noticed that the bolts on the wheels were worn and replaced them with new bolts from the owner. The contractor wore out the threads on the bolts several more times and continued to replace them. While the contractor was using the scaffolding repairing a heating unit, the scaffolding moved and one of the contractor's employees fell from the scaffolding and was injured. The injured man sued the printing plant because he claimed the scaffolding was defective. The court ruled there were no defects in the scaffolding at the time the printing plant loaned it to the contractor. The court ruled that since the contractor was the one who found the defect with the wheels, it was the contractor's responsibility to make sure the scaffold was safe. The court also ruled that the contractor accepted all risks involved with continuing to use the scaffolding after he discovered problems with the wheels. The court found nothing wrong about loaning the owner's property to the contractor as long as there was no defects in the property that the owner knew about and failed to notify the contractor about.

It is clear from these two previous cases that the owner may loan the contractor safety equipment or other property required for the contractor to perform his work. If the owner is aware of any defects in the equipment being loaned, the owner must inform the contractor of the defects. If there is a defect in the equipment

being loaned and the owner notifies the contractor of the defect, the contractor assumes all liability involved with using this defective equipment if the contractor chooses to use the defective equipment.

V. CONCLUSION

There is a significant number of previous court cases which help to define negligence involving contractors who perform work for owners in potentially dangerous situations such as confined spaces. All of these previous court cases are based on the general principle that in a given situation both parties should act in a fashion that is consistent with the actions of a reasonable prudent man. The owner and contractor should mutually strive to see that all work is performed in a safe manner. Specific guidelines for avoiding negligence could be summarized as follows:

1. The owner has a legal obligation to inform the contractor of any potentially hazardous situations which the owner is aware of and the contractor is not aware of.

2. The owner must be very specific about identifying potential hazards to the contractor. The owner should carefully review each hazard with the contractor.

3. If the owner does a reasonable job of informing the contractor of any potential hazards, and the contractor chooses to do the work, the contractor then accepts any liability arising from performing the work. The owner is not liable if the contractor chooses to do the work.

4. An owner can loan his property to a contractor so the contractor can use the equipment to safely perform his work.

5. If the owner is aware of any defects in the equipment that the owner is going to loan to the contractor, the owner must inform the contractor of the defect. If the contractor elects to use the defective equipment, the contractor then assumes all liability involved with the use of the equipment.

6. In unique situations, both the owner and contractor should act in the same manner as a prudent man would act to prevent injury to all parties involved.

VI. APPENDIX OF RELATED CASES

The following cases are all related to the subject of this paper:

1. Deaton V. Board of Trustees of Elon College
   38 S.E.2d 561

2. White V. United States
   97 F.Supp. 12

3. Brooks V. United States
   194 F.2d 185

4. Clinton Foods, Inc. V. Youngs
   266 F.2d 116

5. Larson V. Dauphin Realty, Inc.
   224 F. Supp. 989

6. Spivey V. Babcock & Wilcox Company
   141 S.E.2d 808

VII. REFERENCES

[1] U.S. Department of Labor Occupational Safety and Health Administration, OSHA Safety and Health Standards, OSHA Publication 2206, 1981, p. 292-297

[2] Ibid.

[3] Guralnik, David B., Websters New World Dictionary, (William Collins & World Publishing Co., Inc., 1976), p. 402

[4] Len Y. Smith, G. G. Roberson, Richard A. Mann, and Barry S. Roberts, Smith and Roberson's Business Law, (West Publishing Co., 1988), Appendix I, p. 213

[5] Corpus Juris Secundum, Volume 65, p. 487

[6] Corpus Juris Secundum, Volume 65, p. 866-867

[7] Hendricks V. Socony Mobil Oil Co., 195 N.E.2d 1

[8] Paul V. Staten Island Edison Corp., 155 N.Y.S.2d 427

[9] Ibid.

[10] Bell V. Liberty Drug Co., 228 N.Y.S.2d 846

[11] Dixon v. United States of America, 296 F.2d 556

[12] Petty V. Cranston Print Works Company, 90 S.E.2d 717